Office Supreme Court U. S.
FILED,
OCT 30 1895
JAMES H. McKENNEY,
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617.

IN THE

Supreme Court of the United States.

The Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly, Jr., and others.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

R. A. AYERS,
R. C. DALE,
E. M. FULTON,
A. L. PRIDEMORE,
J. L. WHITE,
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SUPREME COURT OF THE UNITED STATES.

The Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly, Jr., James C. Hubbard, Leroy Day, et al.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In April, 1893, the Lehigh Mining and Manufacturing Company, a citizen of Pennsylvania, instituted an action of ejectment in the Circuit Court of the United States for the Western District of Virginia, at Abingdon, against J. J. Kelly, Jr., and others, citizens of Virginia, for the recovery of a boundary of land, containing about three thousand acres, lying in Wise County, Virginia, and for damages for the detention thereof.

The defendants filed pleas to the jurisdiction, alleging that the Virginia Coal and Iron Company, a citizen of Virginia, was the real plaintiff, and that it had, shortly before the institution of the suit, made a collusive and fraudulent transfer to the plaintiff, for the purpose of giving jurisdiction to the Federal Court. Issue was joined on these pleas, and at the May Term, 1894, the case was tried by the court without a

jury on this issue, upon an agreed statement of facts. This statement of facts admitted that the purpose of the transfer was to give jurisdiction to the Federal court, but also admitted that the *transfer was absolute*, and that the Virginia Coal and Iron Company had no interest in the Lehigh Mining and Manufacturing Company, no interest in said land, and no interest whatever in the result of said suit.

The court, however, Judge Paul presiding, dismissed the case for want of jurisdiction, being of opinion that the transfer was a fraud upon the jurisdiction of the Federal Court. This was done at the May Term, 1894. The plaintiff forthwith tendered a bill of exceptions which set forth all the facts, and this was signed and sealed and made a part of the record.

Shortly after the end of the May Term, 1894, the attention of plaintiff's counsel was called to the case of *Maynard* vs. *Hecht*, reported in *151 U. S., 324*, and being of opinion that, under that decision, this case could not be taken to the Supreme Court by means of a writ of error, they at the next term moved the trial court to certify the question of jurisdiction to the Supreme Court, pursuant to the Judiciary Act of March 3d, 1891. Judge Paul was of opinion, however, that the question of jurisdiction had been already sufficiently certified; but that, whether this were so or not, such a certificate could not be signed after the trial term, and therefore he denied the motion.

Thereupon, the plaintiff moved this court for leave to file a petition for a *mandamus* to require his Honor, Judge Paul, to sign said certificate. This motion was submitted January 28th, 1895, and decided March 4th, 1895. Without passing upon the question as to whether such a certificate could be signed after the trial term, this court held that the question had already been sufficiently certified, and, therefore, denied the motion for a *mandamus*. *See* In re *Lehigh Mining and Manufacturing Company*, decided March 4th, 1895, *156 U. S., 322*.

Immediately after this decision the plaintiff took steps to, and did, perfect a writ of error from this court. On June 3d, 1895, the defendants in error made a motion to " advance and

affirm," pursuant to rule 32 of this court. This motion was assented to by the plaintiff in error and allowed by the court, and this is the motion to be now passed upon; in order to do so it will be necessary to pass upon the merits of the case.

SPECIFICATION OF ERROR.

The assignment of error is as follows: "The court erred in holding that it had not jurisdiction in said cause and in holding that your petitioner is not a *bona fide* corporation, organized and existing under the laws of the State of Pennsylvania, and erred in holding that the controversy in said cause was not substantially between citizens of different States, and erred in dismissing the declaration in said cause for lack of jurisdiction." *See printed record, page 16.*

ARGUMENT.

As before stated, the pleas to the jurisdiction were submitted to the court, without a jury, upon an agreed statement of facts, which agreed statement was as follows: "It is agreed between the parties to this action as follows, to wit:—

"*First.*—That the land in controversy in this case was, prior to March 1st, 1893, claimed by the Virginia Coal and Iron Company, and had been claimed by said last-named company for some twelve years years prior to said date.

"*Second.*—That said Virginia Coal and Iron Company is a corporation organized and existing under the laws of the State of Virginia, and is a citizen of Virginia.

"*Third.*—That on March 1st, 1893, said Virginia Coal and Iron Company executed and delivered a deed of bargain and sale to said Lehigh Mining and Manufacturing Company, by

which it conveyed all its right, title, and interest in and to the land in controversy to said last-named company in fee simple.

"*Fourth.*—That said Lehigh Mining and Manufacturing Company is a corporation duly organized and existing under the laws of the State of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is and was at the date of commencement of this action a citizen of the State of Pennsylvania, and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company.

"*Fifth.*—That the purpose in organizing said Lehigh Mining and Manufacturing Company and in making to it said conveyance was to give to this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company and has no interest therein whatever.

"*Sixth.*—That the two pleas in writing filed by the defendants in this cause at the May Term, 1893, of this court shall be tried by the court without a jury upon the foregoing statement of facts, but that any party may object to any of such statements on the ground of irrelevancy or incompetency." *See printed record, pages 9 and 10.*

The defendants contend that the fact that "the *purpose* in organizing said Lehigh Mining and Manufacturing Company and in making to it said conveyance was to give to this court jurisdiction in this case," shows that the transaction constitutes a fraud upon the Federal Court and prevents its jurisdiction from attaching. We contend, on the other hand, that the fact that the plaintiff and defendants are citizens of different States, and that "said conveyance passed to said Lehigh Mining and Manufacturing Company all the right, title, and

interest of said Virginia Coal and Iron Company in and to said land, and that since said conveyance, said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of the Lehigh Mining and Manufacturing Company, and has no interest therein whatever," gave to the Circuit Court jurisdiction, and that the *motive* in making the conveyance is wholly immaterial, and will not be considered by the court. In other words, the sole question is, was the conveyance absolute? Did it pass all the right, title, and interest of the Virginia Coal and Iron Company in the subject matter?

The following cases sustain the above proposition, viz: *Barney* vs. *Baltimore*, 6 *Wall*, 280; *McDonald* vs. *Smalley*, 1 *Peters*, 620; *Smith* vs. *Kernochen*, 7 *Howe*., 198; *Marion* vs. *Ellis*, 10 *Fed. Rep*., 410; *DeLaveaga* vs. *Williams*, 5 *Sawy*., 573; *Hoyt* vs. *Wright*, 4 *Fed. Rep*., 168; *Briggs* vs. *French*, 2 *Sumner*, 251.

In the above case of *McDonald* vs. *Smalley*, 1 *Pet*., 620, it appeared that—

"M., a citizen of Ohio, apprehensive his title to lands in that State could not be maintained in the State court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of $1100, offered to sell and convey to him the land, in payment of the debt, stating in the letter by which the offer was made that the title would most probably be maintained in the courts of the United States, but would fail in the courts of the State. The property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done. The plaintiff in error, after the land was conveyed to him, gave his bond to make a quit-claim title to the land, on condition of receiving $1000. *Held*, that the title acquired by the purchaser gave jurisdiction to the courts of the United States. (623). The motives which induced M. to make the contract for the purchase of the land can have no influence on its validity. A court cannot enter into the consideration of those motives when deciding on its jurisdiction. (624)."

This opinion was delivered by Chief Justice Marshall, and has several times been approved and reaffirmed.

In *Smith* vs. *Kernochen*, *7 Howard*, *198*, a mortgagor assigned the mortgage to a non-resident for the purpose of conferring jurisdiction on the Federal court. Mr. Justice Nelson, delivering the opinion of the court, said:—

"But the charge, we think, may also be sustained upon the ground on which it was placed by the court below. For, even assuming that both parties concurred in the motive alleged, the assignment of the mortgage, having been properly executed and founded upon a valuable consideration, passed the title and interest to the company to the plaintiff. The motive imputed could not affect the validity of the conveyance. This was so held in *McDonald* vs. *Smalley* (1 Peters, 620). This suit would be free from objection in the State courts; and the only ground upon which it can be made effectual here is that the transaction between the company and the plaintiff was fictitious and not real, and the suit still, in contemplation of law, between the original parties to the mortgage. The question, therefore, is one of proper parties to give jurisdiction to the Federal courts; not of title in the plaintiff. That would be a question on the merits, to decide which the jurisdiction must first be admitted. The true and only ground of objection in all these cases is that the assignor, or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same State, jurisdiction, of course, cannot be upheld. (1 Peters, 625; 2 Dallas, 381; 4 *Ib.*, 330; 1 Wash. C. C., 70, 80; 2 Sumner, 251.)"

In *Barney* vs. *Baltimore*, *6 Wall*, *280*, the court said:—

"If the conveyance by the Ridgelys of the District to Samuel C. Ridgely, of Maryland, had really transferred the interest of the former to the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose.

McDonald vs. *Smalley*, 1 Pet., 620, and several cases since, have well established this rule. But, in point of fact, that conveyance did not transfer the real interest of the grantors. It was made without consideration, with a distinct understanding that the grantors retained all their real interest, and that the deed was to have no other effect than to give jurisdiction to the court. And it is now equally well settled that the court will not, under such circumstances, give effect to what is a fraud upon the court and is nothing more. In the case of *Smith* vs. *Kernochen*, *7 How., 198*, this court said: 'The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants, notwithstanding the conveyance.' And the court cites *McDonald* vs. *Smalley*, already mentioned; *Maxfield's Lessee* vs. *Levy*, *4 Dall., 330*; *Hurst's Lessee* vs. *McNeil*, *1 Wash. C. C., 70*; and *Briggs* vs. *French*, *2 Sumner, 251*."

In the case of *Marion* vs. *Ellis*, *10 Fed. Rep., 410*, it was held that "where a citizen of one State transfers mortgage notes held by him to a citizen of another State, or a foreigner, who thereupon, by virtue of his citizenship, brings suit upon the same in the Circuit Court, the Circuit Court will take jurisdiction of such a suit, although the transfer was made for the purpose of giving the court jurisdiction, provided such transfer be not accompanied with an agreement to retransfer the property to the grantor after the termination of the litigation. The court, in the absence of such an agreement, will not inquire into the motives which induced the act." *Syllabus, citing DeLaveaga* vs. *Williams*, *5th Sawy., 574*

In the above case of *DeLaveaga* vs. *Williams*, reported in *5th Sawy., 573*, decided August 14th, 1879, by Mr. Justice Field, in the Circuit Court of the District of California, it appeared that "the complainant is a subject of the king of Spain, and claims to be the owner of an undivided fourth interest in a portion of these lands under a deed executed in August,

1877, by Henry M. Nagles, who then held the entire estate. The deed recites a consideration of one dollar, but the evidence of the complainant shows that no consideration was ever paid, and that the deed was executed to enable him to bring this case in the Circuit Court of the United States; and, also, that the expenses of the litigation have been hitherto borne by his grantor. * * * There is no doubt that the sole object of the deed to the complainant was to give jurisdiction, and that the grantor has borne, and still bears, the expenses of the suit. But neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property if he chooses so to do. And the court will not at the suggestion of a stranger to the title inquire into the motives which induced the grantor to part with his interest. It is sufficient that the instrument executed is valid in law, and that the grantee is of the class entitled under the laws of Congress to proceed in the Federal courts for the protection of his rights. It is only when the conveyance is executed to give the court jurisdiction, and is accompanied with an agreement to retransfer the property at the request of the grantor upon the termination of the litigation, that the proceeding will be treated as a fraud upon the court. Such was the case of *Barney* vs. *Baltimore City*, upon which the defendants rely. (*6 Wall., 280.*) Here there was no such agreement, and it will be optional with the complainant to retransfer or retain the property. He is by the deed the absolute owner of the interest conveyed, and can only be deprived of it by his own will, and upon such considerations as he may choose to exact. Being such owner, and a subject of a country on terms of amity with the United States, his right to seek the Federal Court is indisputable." (See *Briggs* vs. *French*, *2 Sumner*, *255-7.*)

In *Hoyt* vs. *Wright*, *4 Fed. Rep., 168*, it was alleged "that the sale and conveyance by Mr. Mills to his coplaintiff Wright, and the discontinuance of the action as to himself in the District Court of the County of Ouray and State of Colorado, was made for the sole purpose of giving this court jurisdic-

tion of said case." The court said: "If this is true exactly as stated, it is no ground for remanding the case, provided the sale was in fact made. A party having property may sell it for the express purpose of enabling his vendee to sue in this court, and if it be a real sale and not a sham, that is no objection to the jurisdiction; but if the transfer is merely colorable—if, notwithstanding the transfer, he still retains his interest in the property, and is still the owner of it—then it would be a collusive proceeding, which, of course, would not confer jurisdiction. The question in such a transaction as this is whether there was a real transfer of the interest by which the vendee in the conveyance obtained a title, or whether it was colorable merely; whether Mr. Mills still retains his interest in it."

The case of *Briggs* vs. *French*, *2 Sumner*, *251*, is instructive. In this case it was contended by the defendant that the conveyance to plaintiff was colorable for the purpose of giving jurisdiction to the Federal Court. In an able opinion, delivered by Justice Story, the court held that the facts proved did not substantiate this defense. The court then went on to say: "But I take this occasion to say that I am by no means prepared to admit the doctrine which this point of the defense supposes. I am yet to learn that a conveyance made by a party to a citizen of another State, for the purpose of enabling the latter to maintain a suit on it in a court of the United States, is not in point of law operative to pass the legal title between the parties. I know of no law that prohibits such a conveyance or declares it inoperative. Nor do I well understand how a mere stranger to the title, not claiming under either of the parties, has a right to inquire into the motive of such conveyance. The most, it seems to me, that can arise from establishing a conveyance of this sort, is to throw back the plaintiff upon the same equities which would have applied to the title in the hands of the grantor. But I cannot see how it defeats the legal estate vested in him by the conveyance. He may hold the legal estate as trustee for the grantor; but that does not affect the legal validity of the conveyance. * * * It is every-day practice for a citizen of one State to remove to another

State, to become a citizen of the latter, in order to enable him to prosecute suits and assert interests in courts of the United States. And provided the removal be real and not merely nominal, and he has truly become a citizen of another State, I have never understood that his motive for the act is inquirable into; or, if his motive is to prosecute a suit in the courts of the United States, that such a motive would defeat his right so to sue. It might be a circumstance to call in question the *bona fides* of the removal or change of domicile. But if the new citizenship is really and truly acquired, his right to sue is a legitimate, constitutional, and legal consequence, not to be impeached by the motives of his removal."

He further goes on to say that such a conveyance is not an evasion of or fraud upon the laws of courts of the United States; that the eleventh section of the Judiciary Act of 1789 (with reference to promissory notes) prohibiting assignments does not apply to this case. "The section, not having prohibited all assignments, but only assignments of notes and choses in action, by implication, leaves all other assignments operative. *Exceptio probat regulam.*"

He then goes on to question the decision in *Maxwell's Lessee* vs. *Levy*, 2 *Dall. R.*, 381, *and more fully reported in* 4 *Dall. R.*, 330, and to show that the reasoning in these cases assumes the conclusion, that is, assumes that there was "no controversy" between the parties *because* the conveyance was a nullity, whereas the validity of the conveyance was the point first to be determined, and to show further that there is no ground whatever for contending that such conveyances are nullities.

The only case cited by the learned judge in the court below in support of his opinion is that of *Greenwalt* vs. *Tucker*, 10 *Fed. Rep.*, 884. That case was an action of ejectment. It appeared that "the plaintiff had no interest in the controversy; that one Reinders, having the tax title in question, executed and acknowledged a deed in blank as to the grantee; that he left that paper with his attorney 'for collection' (whatever that may mean); that said attorney filled the blank with the name of the non-resident plaintiff for the

mere purpose of bringing suit in her name in the United States Court, she not having paid any consideration therefor." *Held*, that this was a fraud on the jurisdiction, and did not give plaintiff the right to sue in the United States Court.

When this case is properly considered it does not in the least conflict with the above decisions cited by us. This was not a *bona fide transfer:* the original owner was still the *real plaintiff*. Judge Paul seemed to lay some stress upon the fact that there was in that case no consideration for the transfer, and seemed to think that the opinion of the court was based upon that fact. This is an erroneous inference. The fact that there was no consideration is mentioned by the court, but mentioned only as one of the facts tending to show the fraudulent character of the transfer. If the transfer is absolute and *bona fide*, the fact that there was no consideration cannot possibly affect its nature.

That the case does not conflict with the cases cited by us is apparent from the following remarks of the judge, viz.: "Can a nominal grantee, who has no real interest in the controversy, and to whom the realty has been transferred only for the purpose of bringing in his name a suit in the Federal Court, escape the consequences of a plea in abatement, or of an issue in the nature of a plea in abatement, whereby it may be shown that he is not the real party in interest, and further, that his formal relation to the controversy was solely to effect a fraud on the jurisdiction?"

Again, "The sole question is whether the transfer by a blank deed, *mala fide*, without consideration, of the title to a parcel of land in Missouri, for the purpose of bringing suit in this court, will enable such grantee to maintain an action of ejectment here? If such be permissible, then, despite constitutional and legal provisions and restrictions, nearly every controversy can, through fraudulent schemes, be absorbed in the Federal vortex, to the great damage and possible ruin of the adverse party through extraordinary costs and expenses."

It is manifest, therefore, from these decisions, that the court will not inquire into the *motive* of a conveyance, and that the sole question is whether the conveyance was absolute or

not, and as the "agreed facts" admits that it was, it would seem needless to prolong the argument. But the case at bar in one respect is different from any of those above cited. Here the "agreed facts" admits that the Lehigh Mining and Manufacturing Company "was organized by the individual stockholders and officers of the Virginia Coal and Iron Company." Our opponents construe this to mean that the officers and stockholders of the two companies are identical. It does not bear any such construction, and such is not the fact; but, for the sake of the argument, let us assume that it is so. Does this fact change the result to be reached by deduction from the principles laid down in the above cases? It is contended that as the same stockholders own the stock in both corporations, and as the same officers control both companies, the two companies are virtually one and the same, and, therefore, that the suit instituted by the Lehigh Mining and Manufacturing Company is a suit for and on behalf of the Virginia Coal and Iron Company. This argument results from a confusion of thought in not clearly distinguishing a *corporation* from its *stockholders*. That a corporation is a separate and distinct being from its stockholders has been over and over again decided by cases too numerous to mention, and one line of these decisions seems quite pertinent to the present inquiry, *i. e.*, the decisions holding that the citizenship of a corporation is to be determined by the place of its incorporation and not by the citizenship of its stockholders. A corporation organized and existing under the laws of Pennsylvania may, therefore, institute and maintain a suit in a Federal Court in Virginia against citizens of Virginia, although all of its stockholders are citizens of Virginia. And it is wholly immaterial whether its stock is owned by individuals, citizens of Virginia, or by corporations organized under Virginia laws. If, therefore, the Lehigh Mining and Manufacturing Company had been organized without reference to the present suit and had become invested with the title to the land in question by conveyance from the Virginia Coal and Iron Company, and the Virginia Coal and Iron Company had thereafter purchased all the stock of the Lehigh Mining and Manufacturing Com-

pany, no one would think of contending that this fact would prevent the maintenance of this suit in the Federal Court. Does the fact that the Lehigh Mining and Manufacturing Company was organized with a purpose, and that the conveyance to it was made with a purpose, alter the situation? No; because, as we have before seen, the motive for such a transfer cannot be inquired into.

This would be the result even if it were admitted that the Virginia Coal and Iron Company in its corporate capacity owned all the stock of the Lehigh Mining and Manufacturing Company. But such is not the case. The "agreed facts" expressly admit that the Virginia Coal and Iron Company "owned none of the stock of the Lehigh Mining and Manufacturing Company." *A fortiori*, then, the ownership of the stock of the latter company by the stockholders of the former does not oust the Federal Court of its jurisdiction.

But Judge Paul thinks that such a conclusion would lead to mischievous results. He says: "The device might be carried still further. An individual citizen, finding himself in a controversy with his neighbor concerning a tract of land, and desiring to have the question tried in a Federal Court, could very readily organize a corporation in another State for the purpose of bringing a suit in the Federal Court, then convey whatever interest he claims in the land to a foreign corporation of his own creation and in which he is the only stockholder, and the courts of the United States would be open to him to litigate in a Federal Court a question that the laws of the land, State and Federal, contemplate shall be litigated in the courts of the State of which both parties are citizens." *See printed record, page 13.* Suppose that any individual citizen, without reference to any future litigation, should organize a corporation in another State, and then convey his land to such corporation, in which he owned all the stock—could he not maintain a suit thereafter arising in the Federal Court? Clearly he could, unless the well-settled rule that the citizenship of a corporation must be determined by the place of its incorporation is to be overthrown and held for naught. But assume he had the motive supposed by Judge Paul. Would

this affect the question? Not unless at least three decisions of this Court and four at least of the Federal Circuit Courts are to be uprooted and reversed.

But is not the danger which Judge Paul fears more imaginary than real? It costs something to organize a corporation in another State and costs to maintain it after organized. It will never be done except where the local prejudice is so great that it is an impossibility to obtain justice in the State courts, and this is the very case which the spirit of the Constitution intended to make cognizable in the Federal courts. The "device," the "scheme," which Judge Paul anathematizes is intended to accomplish justice, not to work injustice—to enable certain individuals, who are citizens of Pennsylvania, to maintain their rights in Virginia; it comes within the spirt of the Constitution, and should be upheld if "technically" within the law, and Judge Paul admits it is. *See printed record, page 12.*

Again, assume that Judge Paul is right—assume that the "device," if approved, would result in a great influx of suits to the Federal courts; is this a sufficient reason for disapproval? Are not corporations every day organized in one State for the purpose of doing business in another, the chief object thereof being to enable them to defend and prosecute their rights in the Federal courts? No one can or will deny this, and yet no one has ever urged it as a reason for denying Federal jurisdiction. Is a *special* intent any more culpable than a *general* intent? Is a purpose to defeat the jurisdiction of the State courts in *every* case any less frandulent than a purpose to defeat it in *one* case?

We submit that unless this court is of opinion that the whole fabric of the law with reference to the jurisdiction of corporation cases by the Federal courts is wrong and rotten, and is prepared to overthrow it, root and branch, then the case at bar must be reversed and remanded for further proceedings.

In conclusion, we desire to notice one other point made by the defendants' counsel in the court below, *i. e.*, they contend

that whatever the law may have been prior to 1875, yet it was by the Act of March 3d, 1875, expressly provided that the courts should take cognizance of the *motive* of an assignment, and must dismiss a cause whenever it is made to appear that an assignment has been made for the purpose of giving the Federal Court jurisdiction.

That Act provided, "That if in any suit commenced in a Circuit Court or removed from a State court to a Circuit Court of the United States it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remove it to the court from whence it was removed, as justice may require," &c. *See 18 Statutes at Large, chapter 137, section 5, page 427.*

We, submit, however, that this Act was not intended in any manner to change the law as to the jurisdiction of the Federal Courts, but only to change the method of raising the question of jurisdiction. Prior to the Act it had sometimes been held and was generally supposed that the question could be raised only by a plea in abatement. This Act allows it to be raised by motion, and even permits the court to dismiss a case *suo motu* without motion or plea. That this is the effect of the statute, and the only effect, appears from the cases cited by defendants' counsel.

Thus in *Williams* vs. *Township of Nottawa, 14 Otto, 209,* the court said: "That being so, it was the duty of the Circuit Court to dismiss the suit as to these bonds, and proceed no further; for as to them the controversy was clearly between citizens of the same State, Kline and Conner being the real plaintiffs. The transfer to Williams was colorable only, and never intended to change the ownership. This both Williams

and Kline and Conner knew. Under the Act of 1789, it was held in *Smith* vs. *Kernochen*, 7 *How.*, 198, that this objection was one which could only be taken by plea in abatement; but in *Barney* vs. *Baltimore*, 6 *Wall.*, 280 (73 U. S., XVIII., 825), there was no such plea, and the bill was dismissed in this court without prejudice, because it appeared in evidence that certain conveyances by means of which the citizenship of the parties was changed so as to give the courts of the United States jurisdiction did not transfer the real interest of the grantors. But whatever may have been the practice in this particular under the Act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and made it the duty of the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared."

So in *Hartog* vs. *Memory*, 116 *U. S.*, 588, the court said, "It was well settled before the Act of 1875 that when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction. *Farmington* vs. *Pillsbury*, 114 *U. S.*, 138, 143, and cases there cited. In its general scope this rule has not been altered by the Act of 1875, but before that Act was passed it had been held that the rule prevented the courts from taking notice of colorable assignments or transfers to create cases for the jurisdiction of the courts of the United States in the absence of a plea in abatement or to the jurisdiction; and as that Act 'opened wide the door for frauds upon the jurisdiction of the court by collusive transfers so as to make colorable parties and create cases cognizable by the courts of the United States,' we held in *Williams* vs. *Nottawa*, 104 *U. S.*, 209, 211 (*Bk.* 26, *Led.* 719, 720), that the statute changed the

rule so far as to allow the court at any time, without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered."

Respectfully submitted,

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BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF THE CASE.

In February 1893, the plaintiff was, by the laws of the State of Pennsylvania, incorporated: the 1st day of March, 1893, received a conveyance of the land in controversy from the Virginia Coal & Iron Company, a Virginia corporation, on the — day of April, 1893, this suit in ejectment was brought in the circuit court of the United States, for the Western District of Virginia, in May following defendant filed two pleas in abatement of said action, (see page — of trancript) and on an

agreed state of facts, (see page — of transcript) was submitted to the court for trial. Thereupon the court abated the action, and plaintiff appealed.

The questions therefore are :

First. Were the pleas proven ?

Second. If proven, did they or either of them constitute a cause of abatement ?

Substance of Agreement of Facts as Evidence.

It is agreed that for twelve years preceding the first of March 1893, the Virginia Coal & Iron Company, a corporation organized and existing under the laws of the State of Virginia, had claimed the land in controversy of defendant.

That the stockholders and officers of the Virginia Coal & Iron Company for the purpose of giving the United States Court jurisdiction of this suit, procured the incorporation in the State of Pennsylvania of the plaintiff, which is composed of the same stockholders and officers as the Virginia Coal & Iron Company in February, 1893, and that the Virginia Coal & Iron Company on the 1st day of March 1893, conveyed for that purpose said land in fee simple to the plaintiff, and the Virginia Coal & Iron Company has no interest in this suit or stock in Plaintiff, See printed record pages 7 and 10.

Argument.

The defendant insists that the record presents a jurisdictional question only based upon diverse citizenship of the parties and that it was obtained by collusion and a fraud upon the law, as will appear from the pleas of defendant filed to the original declaration in May, 1893, See printed record for pleas, page — and the agreement of facts aforesaid.

Where no alienation is shown of property or abandonment of the occupancy of offices, and both are shown to have been once possessed, it is presumed to continue.

Wharton on Evidence, 2 d. Vol., Sec. 1286; McGee vs. Scott, 9 Cush. 148.

I therefore conclude each stockholder and officers' interest in the property, is unchanged from what it was before the organization of the plaintiff as a corporation, and that this fully proves the plea and establishes an identity of person, interest, position, property and occupancy of place in and by the same persons who constituted the Virginia Coal & Iron Company.

And it is further insisted that the fact a different name was given by request of these persons in another State for the purpose of forcing upon the United States Court the jurisdiction of this cause and depriving the courts of Virginia of their lawful jurisdiction, does not destroy the identity or accomplish the intent of the plaintiff, but upon the contrary establishes that it was done to evade the law. Clearly this is an artifice or device to evade the law that controls jurisdiction and deprives another of a legal right, being such, it falls within the letter and spirit of cases adjudged to be fraudulent.

See The William King, 2d. Wheat. 148.

Lee v. Lee, 8 Pet 44.

Benedict v. Post, 12 Barb. 186, 35 Id. 452.

Randall v. Howard 2nd. Black. 590-3.

It was said in Butler vs. Farnsworth, 4 Wash. C. C. 101-3, in regard to actual persons "if the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the Federal Courts, and the facts be made out by his acts, the Court must pronounce it without bona fide intention of changing his domicile, however frequent and public his declarations to the contrary may have been." This was quoted with approval in Morris vs. Gilmer 129 U. S. Supreme Court Rep. 315.

In this case the corporation has only two purposes to serve by its creation and existence, namely; receive a deed for this land

and sue in the Federal Court. Judged by the maxim "*Expressio unis exclusio est alterius*," it has no business in Pennsylvania whatever or any other place except as aforesaid.

It is submitted that a *suing corporation* was never contemplated by the court when it propounded the legal presumption "a corporation is conclusively presumed to be a citizen of the state in which it was incorporated," or by that presumption to give an artifice which deprives a State court of its rightful jurisdiction and prejudice, by increasing the cost of litigation, its citizen thus in effect violating the principle announced in Randall vs. Howard 2nd. Black 590-3. Consistent with this view has been the current of our Virginia cases, and if the Court will pardon me for referring as argument to the views entertained by Virginia Courts, I will call their attention to three cases, the first of which is that of Miller vs. Marshall, 1st. Va. cases 158. The plaintiff sought to recover a rent reserved in an action upon an account before a Justice's Court. Upon application the General Court awarded a writ of prohibition considering the rents reserved an incorporeal heraditament and the jurisdiction being in another tribunal. In Lowry vs. Houston 2nd. Va. cases 42, a debt of $80.00 (above a Justice's jurisdiction) after it became due was by agreement of the parties substituted by four single bills of $20.00 each, thereafter becoming due at different periods. When the whole was due the creditor sued out separate warrants from Justice upon each bill. Again the court by prohibition interfered. In James vs. Stokes et als. &c. 77 Va. 225, the defendant owed the plaintiff $126.73 upon an account for which he took three bonds payable at different periods. When all had falled due, a Justice rendered separate judgments upon each of the bonds and awarded execution. Upon application a writ of prohibition was again awarded. Thus so far as Virginia is concerned, she has repudiated all artifice or device as fradulent, that seeks to evade the jurisdictional law of the state.

It is also respectfully submitted, that if not fradulent, the changing of the name by a re-incorporation in the State of Penn-

sylvania does not change the indentity with the Virginia Coal & Iron Company nor at all effect the want of jurisdiction in the Federal Courts to try the case. Morawetz on Private Corp. Vol. 1, sec. 354 as to change of name. As to the jurisdictional question permit me to quote from Morawetz on Corp. sec. 999, Vol. 2nd., where the learned author says; "In applying the constitutional provision and acts of Congress conferring jurisdiction upon the Circuit Court of the United States, the shareholders or members of a corporation must be conclusively presumed to be citizens of the state or county under the laws of which they were incorporated. Practically, therefore, a corporation must be treated as a citizen of the state in which it was formed. The franchises which a corporation chartered by several States can exercise in either State must be derived from the laws of that State alone. And it has been decided that, for the purpose of determining the jurisdiction of the Circuit Courts, a corporation chartered by several states must, when sued in either state, be treated as a citizen of *that state alone.* Citing Railway Co. vs.-Whitton, 13 Wall, 283 and other cases in note 4.

In natural persons, their ***status*** fixes the law. In artificial persons the status is fixed by construction. In civil transactions the intent gives it its character. In this case the intent was to evade the law, which I submit, *per se*, is fraudulent and void, for a conference or collusion must have necessarily preceded the acts done and those acts were in pursuance of thatdesign for the special purpose of giving jurisdiction. The declaration of one intent, especially when given explanatory of acts done, exclude others. Then the plaintiffs are here with no other property or purpose than to sue in the Federal Court. Fraud says Mr. Wharton, "prevents a presumption from operating."

2nd Wharton's Evidence, Sec. 1241.

Indeed a presumption is never allowed to work an injury, defeat a right, or perpetuate an injustice.

There is a great difference between a presumption indulged by a court to facilitate the administration of justice to bona fide

corporations who have no odor of fraud and against whom no intention is shown to evade a jurisdictional rule of law, and a presumption invoked avowedly for the purpose of evading a jurisdictional rule of law and by artifice impose upon a court and give additional burdens to private citizens by requiring them to litigate in a distant county, and deprive them of a trial in the county in which they reside.

To give effect to or sanction such a transaction would, in my opinion, resurrect the John Doe and Richard Roe of historic memory with a change of names to discharge the functions of those famous characters, they would be generally designated as "sueing corporations," organizations to conduct litigation between citizens of the same State and presumably account to the parties when the litigation was over while the actual parties in interest would become "*disinterested witnesses.*" Should the plaintiff's contention obtain this state of facts would result. Virginia citizens (presumably) would by an order of a Pennsylvania court (presumably) become citizens of that State and sue in a Federal court a natural citizen of Virginia. To-morrow, if successful, they would reconvey to "the presumed citizen of Virginia" and no one in the entire transaction would be more effected by all this change than one would be by changing his purse from his right to his left pocket except the person whose rights were fixed by a status designated by the constitution. The law so long supposed to have fixed the jurisdiction of courts and the rights of citizens would become unsettled as a weather-vane controlled only by the will of the probable plaintiff, and the United States Courts, one day burden with duties and the next without them. I submit that it is an attempted evasion, which is pregnant with the sentiment "my will must prevail over the whitten constitution of a great people" garnished only with the whiting of a legal fiction. I submit they can't thus cover their sin, but that it should be visited, as under the Roman laws, all who sought under the guise of law, to do a wrong were, and all such were punished doubly.

Whether the jurisdiction be fraudulently invoked, or this corporation plaintiff be identical with the Virginia Coal and Iron Company, the same result follows, the judgment of dismissal is right and all of which is most respectfully submitted.

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Of counsel for defendant in error.

Prepared by
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Office Supreme Court, U. S.
FILED.
NOV 11 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

NOVEMBER TERM, 1895.

NO. ~~1896.~~ 617

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THE LEHIGH MINING AND MANUFACTURING CO.

PLAINTIFF IN ERROR,

VS.

J. J. KELLY, JR., ET AL.

DEFENDANTS IN ERROR.

—{o}—

Brief of F. S. Blair,

Of Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

NOVEMBER TERM, 1895.

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DEFENDANTS IN ERROR.

Brief of F. S. Blair,

Of Counsel for Defendants in Error.

J. J. Kelly, Jr., by his counsel, F. S. Blair, calls the special attention of the Court to the very able opinion of the learned Judge of the Circuit Court, which is found on printed page 8, and original page 14 of record.

It is submitted that the opinion of the learned Judge below furnishes all the brief that is necessary in this case to establish the proposition that he rightly held that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court; that the plaintiff below was collusively made a party to it for the purpose of making a case in the Federal Court; and that the case was properly dismissed.

The case referred to by the learned Judge in his opinion of Greenwalt vs. Tucker et als., reported in 10th. Federal Reporter, at page 884, was a case that involved the question of a fraud on the jurisdiction of the court, and it was held that the transfer by a blank deed, *mala fide*, without consideration, of the title of land in one state to a citizen of another, for the purpose of bringing suit in a Federal Court, will not enable the grantee to maintain a suit in ejectment in such Court; it is difficult to see wherein the doctrine in that case differs from the case at bar.

We have examined the cases referred to by the plaintiffs in error, and, without exception, we find that while a *bona fide* transfer, *for valuable consideration*, although made for the purpose of giving jurisdiction to a Federal Court, is valid for jurisdictional purposes, yet we find no case that has gone so far as to hold that a mere formal transfer, as in the case at bar, without consideration, and for the admitted purpose of having a Federal Court obtain jurisdiction, has ever been sustained.

As said in the case of Greenwalt vs. Tucker, *supra*, at page 887:

"No court with jealous regard to its duties will permit itself to be an instrument of fraud."

We will supplement the opinion of the learned Judge with the following decisions showing that conveyances, without consideration, and for jurisdictional purposes alone, give no such title to the grantee as to give jurisdiction to Courts of the United States.

In Maxwell's Lessee vs. Levy, 2 Dall., 381, it appeared that the Lessor of the plaintiff, a citizen of Maryland, sued the defendant, a citizen of Pennsylvania, and that the conveyance of the premises to the Lessor of the plaintiff was made by one Morris, a citizen of Pennsylvania, for no other purpose than to give jurisdiction to the Circuit Court. It was held that the conveyance was entirely colorable and collusive, and therefore incapable of laying a foundation for the jurisdiction of the court.

Mayfield's Lessee vs. Levy, 4 Dall, 308, is to the same effect.

Smith vs. Kernschen, 7 How, 198, a case relied on by the plaintiff in error, does not sustain its contention, for it holds that if the assignment was only fictitious, then the suit would be between two citizens of the same state, over which the Federal Court would have no jurisdiction; and, besides, in that case the question of jurisdiction was not properly raised by a plea in abatement.

Barney vs. Baltimore City, 6 Wall. 280, another case relied on by the plaintiff in error, does not sustain it, when the conveyance or assignment is colorable only, as in the case at bar.

In Hurst's Lessee vs. McNeal, 1 Wash. 70, it was decided that a deed executed for the purpose of giving

jurisdiction to a Federal Court will not be countenanced so as to sustain the jurisdiction.

Barney vs. Baltimore, 1 Hughes, 118, and :

Starling vs. Hawks, 5 McLane, 318, both sustain the same doctrine.

It is well for the Court to scrutinize the transaction in controversy, and see what it is.

It is not the case of a real transfer of land by one party to another, for a valuable consideration, by a real sale; but it is the case of The Virginia Coal & Iron Company, organized by certain individual stockholders and officers, merely changing its name to The Lehigh Mining & Manufacturing Company, of Pennsylvania, organized by the same individual stockholders and officers of The Virginia Coal & Iron Company, who make a conveyance for the express purpose of giving jurisdiction to a Federal Court. It is the *same* people, under the name of The Virginia Coal & Iron Company, conveying the *same* property to themselves, under another name, The Lehigh Mining & Manufacturing Company, without the change of a stockholder or officer, and without any consideration, and it is admitted that the conveyance was for jurisdictional purposes alone. The fifth paragraph of the Stipulation on top page 10 of the record, admits :

"That the purpose of organizing The Lehigh Mining & Manufacturing Company, and in making to it the said coveyance, was to give this Court jurisdiction in this case."

It was not the case of a transaction with third parties. It was not the case of a conveyance by a grantor to a grantee *bona fide*, but was merely a change in the name of

a Company, from itself to itself, for admitted jurisdictional purposes alone.

The Statute of 1875 would seem to have been passed for the express purpose of preventing such collusion.

Under this Statute, the Court may at any time, without plea and without motion, dismiss the suit the moment a fraud on its jurisdiction is discovered.

Williams vs. Notawa, 104 United States, 209-211.

Hartog vs. Memory, 116 United States, 588-590.

Barry vs. Edmonds, 116 United States, 550.

This case presents nothing more than an assignment of an interest, by the same stockholders and officers, under one name, to the same stockholders and officers, under another name, in order to bring this suit, where this suit could not be maintained by the assignors, and, therefore, cannot be maintained by the assignees.

The Supreme Court of the United States, in Williams vs. Notawa, 104 United States, *supra*, has said that this provision of the Act of 1875 is *salutary*, and that it is the duty of the Circuit Courts to exercise their power under it in all proper cases.

Since the Act of 1875, it seems that the Court is warranted in dismissing wherever it is satisfied that the object of the transfer is to create a case cognizable in the Federal Courts.

Laneer vs. Nash, 121 United States, 404, 410.

In Williams vs. Notawa, *supra*, Mr. Justice Wait, referring to Barney vs. Baltimore, *supra*, uses this language:

"The Bill was dismissed in this Court without prejudice, because it appeared in evidence that certain con-

veyances, by means of which the citizenship of the parties was changed so as to give the Courts of the United States jurisdiction, did not transfer the real interest of the grantors. But whatever may have been the practice in this particular under the Act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the Courts of the United States, Congresss was especially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the Court on its own motion, without waiting for the parties, to stop all further proceedings, and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court, as well as the parties, against fraud on its jurisdiction, for, as was very properly said by Mr. Justice Miller, speaking for the Court, in Barney vs. Baltimore, *supra*, 'such transfers for such purposes are frauds on the Court, and nothing more.'"

We will conclude this brief by asking the special attention of the Court to the case of Hurst vs. McNeal, *ante*, 1 Wash. 70 and 83, where it is said that:

"A deed executed merely for the purpose of giving jurisdiction to a Federal Court, will not be countenanced for that purpose, though, as between the parties, it operates to pass the legal title."

It is admitted by the Stipulation in this case that this deed was made for that purpose alone.

We submit that the judgment of the Court below is correct, and it should be affirmed.

F. S BLAIR,
For Defendants in Error,
J. J. KELLY, JR.
ET ALS.